

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:FSH:MAN:4:TL-N-7470-00
MAMissry

date:

to: Henry Singleton
Territory Manager, Financial Services & Healthcare, Territory 1100
Attn: Mark Weinberg, Team Manager, Group 1106

from: Area Counsel (Financial Services & Healthcare) (Area 1 - Manhattan)

subject: Response to Request for Advice Re: Forms 872
[REDACTED] ([REDACTED] - [REDACTED])
[REDACTED] ([REDACTED] - [REDACTED])
[REDACTED] (remaining open years)
[REDACTED] ([REDACTED] - [REDACTED])
UIL# 6501.08-17

Earliest Statute of Limitations Expires: [REDACTED]

DISCLOSURE STATEMENT

This document may contain taxpayer information subject to section 6103 of the Internal Revenue Code. This document may also contain confidential information subject to the attorney-client and deliberative process privileges, and may also have been prepared in anticipation of litigation. Therefore, this document shall not be disclosed beyond the office or individual(s) to whom it is addressed and in no event shall it be disclosed to taxpayers or their representatives. This memorandum shall not be disclosed or circulated beyond such office personnel having the requisite "need to know."

This is in response to your request for advice regarding the proper caption for Forms 872 given the merger of [REDACTED] (" [REDACTED] ") into [REDACTED] (" [REDACTED] "), with [REDACTED] as the surviving entity. The new entity is titled [REDACTED]. In discussions with attorney Michelle Missry of this office, Team Manager Mark Weinberg requested that this advice cover captions for Forms 872 with respect to [REDACTED], [REDACTED]

██████████ ("██████████"), and ██████████
("██████████").¹ We recommend that the Forms 872 be captioned as follows:

1. ██████████

██████████ (EIN: ██████████) as successor
in interest by way of merger with ██████████
██████████ (EIN: ██████████)

2. ██████████

a) ██████████

██████████ (EIN: ██████████), formerly
known as ██████████ (EIN: ██████████)

b) ██████████

██████████ (EIN: ██████████), formerly
known as ██████████ (EIN: ██████████),
as successor in interest by way of merger with ██████████
(EIN: ██████████)

3. ██████████

██████████ (EIN: ██████████), formerly
known as ██████████ (EIN: ██████████),
formerly known as ██████████ (EIN: ██████████)

The EIN of ██████████, (EIN: ██████████)
should be entered in the upper right hand corner of each of these
Forms 872.

¹ Mr. Weinberg informed Ms. Missry on December 27, 2000 that there is one outstanding cycle on ██████████. On December 4, 1996, this office provided advice to Mr. Weinberg regarding the proper caption of an 872 given the merger of ██████████ and ██████████ (EIN: ██████████). ██████████ was the surviving corporation and the name of the new entity was ██████████. Our office, with National Office concurrence, recommended that the Form 872 with respect to ██████████ be captioned, "██████████ (EIN: ██████████), formerly known as ██████████ (EIN: ██████████)." The merger consequences to ██████████ were not covered in the ██████████ memorandum as our office was only asked to opine with respect to ██████████.

In a January 9, 2001 telephone conversation, Mr. Weinberg requested that Ms. Missry expand this memorandum to include advice regarding the proper parties to execute the referenced Forms 872 and whether the surviving corporation is liable as a transferee.

FACTS

On or about [REDACTED], pursuant to an Agreement and Plan of Merger, [REDACTED] (EIN: [REDACTED]) merged with and into [REDACTED] (EIN: [REDACTED]). Both companies were organized under the laws of the State of Delaware in [REDACTED] and both were the common parents of their respective groups of corporations as of the date of the merger.

As of [REDACTED], [REDACTED] ceased to exist as a separate entity. [REDACTED] was the surviving corporation. The new corporation is known as [REDACTED] (EIN: [REDACTED]).

The Merger proposal at pages [REDACTED] and [REDACTED] states that [REDACTED] and [REDACTED] obtained legal opinions to the effect that the merger qualifies as a tax free reorganization under I.R.C. section 368 (a), except with respect to those [REDACTED] shareholders who accept cash in lieu of fractional shares in the new company.

On or about [REDACTED], [REDACTED] (also a Delaware corporation and the common parent of an affiliated group of corporations) entered into an Agreement and Plan of Merger with [REDACTED] (EIN: [REDACTED]), another Delaware corporation. [REDACTED] was the surviving corporation and the name of the new entity was [REDACTED]. This merger was also effected pursuant to I.R.C. section 368 (a).

DISCUSSION

Proper Caption for Forms 872

I.R.C. section 6501(c)(4) provides an exception to the general rule outlined in section 6501(a) which requires that taxes be assessed within three years after a return is filed. Under section 6501(c)(4), at any time prior to the expiration of the original statute, the IRS and a taxpayer may agree in writing to extend the limitations period and may further extend this agreed upon date with subsequent written extensions. See also Treas. Reg. section 301.6501(c)-1(d).

I.R.C. § 6501(c)(4)(B) requires the Service to advise

taxpayers of various matters involving statute extensions including their right to refuse to extend the statute of limitations on assessment or to limit an extension to particular issues. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayers when soliciting Forms 872. Alternatively, you may advise the taxpayers orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. Your file should be documented as to any action taken in this regard.

IRM 121.2 Statute of Limitations Handbook at 22.2.1 (1) provides that it is the policy of the IRS to obtain statute extensions only in unusual circumstances. Section 22.2.1 (11) provides that if a return statute is open because of a consent, but closing action will not be completed within that extended period, another consent can be obtained to further extend the statute. In this case, the taxpayers outstanding taxable years are currently open by consent and additional consents are necessary to preserve the IRS' rights to make the necessary adjustments for these years.

Pursuant to Income Tax Reg. section 1.1502-77(a)(1) and (2), a common parent is the sole agent for each member of a consolidated group, duly authorized to act in its own name in all matters relating to the group's income tax liability for a given consolidated return year. Therefore, waivers given in the common parent's name for a particular taxable year, shall be considered to be given by each subsidiary and shall have the effect of extending the applicable statute of limitations on assessment of income taxes with respect to each corporation that was a member of the group for that particular taxable year. See also Income Tax Reg. section 1.1502-77(c).

■

Pursuant to Income Tax Reg. section 1.1502-77(a)(1)(i)(B), the common parent shall be the sole agent for any successor of any member of a consolidated group, including the common parent.² Income Tax. Reg. section 1.1502-77(a)(1)(iii) defines successor as a party that is primarily liable, pursuant to applicable law including...by operation of a state...merger statute, for the tax liability of the common parent or any subsidiary of the group.... According to Delaware General Corporation Law section 251(a), any two or more Delaware corporations may merge into a single corporation with one of them as the survivor or they may

² See also Income Tax Reg. section 1.1502-77(d) regarding designation of agent and notification to Commissioner in instances where a common parent will terminate.

consolidate into a new corporation. Under Delaware General Corporation Law section 259(a), the surviving corporation (or the new corporation) succeeds to all assets and liabilities of the merged corporations as well as to all "rights, privileges, powers and franchises, and all and every other interest shall be preserved unimpaired...." Therefore upon the [REDACTED] merger of [REDACTED] into [REDACTED], with [REDACTED] as the surviving corporation, [REDACTED] became the successor to [REDACTED] and the new common parent of/agent for the old [REDACTED] affiliated group, albeit in the new name of the entity, [REDACTED] (EIN: [REDACTED]), as reflected in number 1, above.

[REDACTED]

The legal analysis here is the same as outlined in the [REDACTED] section, above and the proper caption for [REDACTED] is as outlined in number 2 b).

[REDACTED] and [REDACTED]

The common parent remains the agent for the members of the group for any year during which it was the common parent so long as that common parent remains in existence and whether or not one or more subsidiaries have ceased to be members of the group during that particular year. See Treas. Reg. sections 1.1502-75 and 1.1502-77(c) and Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Regarding [REDACTED] and [REDACTED], the preexisting common parent was the survivor in the merger of [REDACTED] into [REDACTED]. Therefore, this entity continues to be the common parent and is the proper one to reflect on the waivers with respect to both [REDACTED] and [REDACTED], albeit with its new name, [REDACTED] (EIN: [REDACTED]), as reflected in numbers 2(a) and 3, above.

Proper Party to Execute Consents

Income Tax Reg. sections 1.1502-77(a)(2)(iii) and (iv) state that the common parent of a group shall file for extensions of time...and will give waivers in its own name. These sections further state that any documents so executed shall be considered as having been executed by each member or successor thereof. Thus, it will be the new common parent, [REDACTED] (EIN: [REDACTED]) that should execute waivers on behalf of each of the subject entities.

Since the regulations under I.R.C. section 6501(c)(4) do not specify who may sign consents to extend the statute of limitations for income tax, the rules applicable to the execution of an original return have been deemed to apply to the execution of consents to extend the statute of limitations on assessment.

Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev.
Rul. 84-165, 1984-2 C.B. 305.

Pursuant to I.R.C. section 6062, corporate income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act on the corporation's behalf. Thus, with respect to the subject entities, any officer of [REDACTED], as set forth in I.R.C. section 6062, may sign the Forms 872.

Transferee

As stated above in the [REDACTED] section, [REDACTED] is the successor to each of the subject entities. Income Tax. Reg. section 1.1502-77(a)(1)(iii). Under Delaware General Corporation Law, the corporation that survives a merger succeeds to the assets and liabilities of the merged corporations. Delaware Corporation Law sections 251(a) and 259(a). Thus, by operation of law, [REDACTED] became liable for the tax liabilities of the subject entities as of the date of the merger, [REDACTED].³

We further recommend that you pay strict attention to the rules set forth in the IRM regarding the preparation and execution of Forms 872. IRM 4541.1(2) requires use of Letter 907(DO) to solicit Forms 872, and IRM 4541.1(8) requires that you use Letter 929(DO) to return the signed Forms 872 to the taxpayer. Dated copies of both letters should be retained in the case file. When the taxpayers return the signed Forms 872, the responsible managers should promptly sign and date them in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The managers must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

The National Office has ten days from the date of this memorandum for review and approval. This advice is subject to such approval and we will notify you when it is received. In the

³ Although I.R.C. section 6901 provides a procedure whereby the IRS may collect taxes from a transferee of property who is liable at law or equity for the taxes of the transferor, under Delaware law successor corporations BY STATUTE succeed to the assets and liabilities of the constituent corporations to a merger. Therefore, you do not need to invoke section 6901 in this matter. See also Income Tax Reg. section 1.1502-77 (a)(1)(v) regarding the fact that the new common parent shall be the sole agent with respect to transferee liability.

interim, please do not discuss this advice with the taxpayers. If you have any questions regarding the above, please contact Michelle A. Missry of this office at (212) 264-1595 x244.

ROLAND BARRAL
Area Counsel

By: _____
THEODORE R. LEIGHTON
Associate Area Counsel (LMSB)